

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FOURTH REGION**

BERKS PRODUCTS CORP.<sup>1</sup>

Employer

and

Case 4–UC–400

TEAMSTERS LOCAL UNION 429, a/w  
INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, AFL-CIO<sup>2</sup>

Petitioner

**REGIONAL DIRECTOR’S DECISION AND ORDER**

The Employer, Berks Products Corp., supplies materials to the construction industry and performs construction-related work from various facilities in southeastern Pennsylvania. The Petitioner, Teamsters Local 429, currently represents a unit of Technicians in the Employer’s Heating, Ventilation, and Air Conditioning (HVAC) Department. The Petitioner filed a unit clarification petition with the National Labor Relations Board under Section 9(b) of the National Labor Relations Act seeking to include in the existing unit all HVAC Installers in the Employer’s newly-established New Home Installation (NHI) Department, contending that these employees are covered by the parties’ collective-bargaining agreement, or alternatively, are an accretion to the existing unit. The Employer contends that the unit should not be clarified.<sup>3</sup>

I have considered the evidence and the arguments presented by the parties and, as discussed below, I have concluded that the unit should not be clarified and I have dismissed the petition. To provide a context for my discussion, I will first present a brief overview of the Employer’s operations. Then, I will review the factors that must be evaluated in determining whether employees in newly-created positions should be accreted to existing units. Finally, I will present in detail the facts and reasoning that support my conclusion.

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<sup>1</sup> The name of the Employer was amended at the hearing.

<sup>2</sup> The name of the Petitioner was amended at the hearing.

<sup>3</sup> The parties stipulated that Mark Feeney, Ron Trupp, and Steve Carr are supervisors within the meaning of the Act and are excluded from the unit.

## **I. OVERVIEW OF OPERATIONS**

The Employer has several divisions, including Crushed Stone, Ready Mix Concrete, Building Products, Millwork, Masonry and Concrete Supplies, Commercial Door and Hardware, and Fuel Oil and HVAC. It operates out of several facilities, most of which are in the area of Reading, Pennsylvania.

The Fuel Oil and HVAC Division is comprised of the HVAC Department, the NHI Department, and Reddi Oil.<sup>4</sup> The HVAC Department operates out of the Employer's facility on Spring Street in Reading, Pennsylvania. The NHI Department, which was created in June or July 2003, is based at a facility on Pottsville Pike, approximately five to ten miles from the Spring Street facility.

The Petitioner currently represents a bargaining unit of employees in the HVAC Department. The extant collective-bargaining agreement, effective October 16, 2003 through October 15, 2004, applies by its terms to the Employer's "heating and air conditioning service mechanics and helpers, and oil drivers."<sup>5</sup> The unit includes about 13 employees. During negotiations for the collective-bargaining agreement, the parties discussed whether to include NHI Department employees in the unit, but they were unable to resolve the issue, and the Petitioner filed the petition in this case on October 24, 2003.

## **II. FACTORS RELEVANT TO DETERMINING ACCRETION AND RELATED ISSUES**

The Board will entertain unit clarification petitions to settle the question of whether employees in newly-created classifications are an accretion to existing units, where the parties were unable to resolve the issue during collective-bargaining negotiations and the petition is filed shortly after the contract was executed. *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001); *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001); *St. Francis Hospital*, 282 NLRB 950 (1987). The Board has followed a restrictive policy in finding accretions to existing units in order to preserve the right of employees to choose their own bargaining representative. *Archer Daniels Midland Co.*, supra; *Towne Ford Sales*, 270 NLRB 311 (1984), enf'd. 759 F.2d 1477 (9<sup>th</sup> Cir. 1985). Thus, in *Melbet Jewelry Co.*, 180 NLRB 107 (1969), the Board emphasized that it will not, under the guise of accretion, compel a group of employees to be included in an overall unit, "without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." The Board will not find an accretion when the employee group seeking accretion would constitute a separate appropriate bargaining unit. *Passavant Retirement and Health Center*, 313 NLRB 1216 (1994). Rather, the Board will permit accretion to promote labor relations stability only if new employees have such strong common interests with members of an existing bargaining unit that the new employees would have been included in the unit or covered by the contract.

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<sup>4</sup> Reddi Oil performs oil delivery work. Its drivers are not represented by a union.

<sup>5</sup> It is undisputed that the HVAC Technicians are covered by this unit description.

*United Parcel Service*, 303 NLRB 326, 327 (1991), *enfd.* 17 F.3d 1518 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1076 (1995). See also *Archer Daniels Midland Co.*, *supra*. When determining if new employees have a community of interest with employees of an existing bargaining unit, the Board considers: integration of operations; centralization of management and administrative control; geographical proximity; similarity of working conditions, skills, and functions; collective-bargaining history; and employee contact and interchange. *Archer Daniels Midland Co.*, *supra*. Of these, the two most important factors are common day-to-day supervision and employee interchange. *Id.*

The Board has further held that a single facility unit geographically separate from other facilities is presumptively appropriate, even though a broader unit might also be appropriate. *Passavant Retirement and Health Care Center*, *supra*; *Manor Healthcare Corp.*, 285 NLRB 224, 225 (1987). This presumption may be rebutted if the additional employees have little or no separate group identity and share an overwhelming community of interest with the preexisting unit. *Passavant Retirement and Health Care Center*, *supra*.

Where bargaining units are defined by the work performed, i.e., “functionally described,” rather than by job classification, the Board does not use a traditional accretion analysis. Rather, the Board will presume that new employees performing job functions similar to those performed by unit employees, as defined in the unit description, should be added to the unit unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. *The Sun*, 329 NLRB 854, 859 (1999).

An accretion analysis is inapplicable where a new classification performs the same basic function that a unit classification historically had performed. In those cases, the new classification is viewed as belonging to the unit. *Developmental Disabilities, Institute, Inc.*, 334 NLRB 1166 (2001); *Premcor, Inc.*, *supra*.

### **III. FACTS**

#### *HVAC Department*

HVAC Department Technicians install HVAC equipment and perform service and maintenance work. They also install and maintain related equipment such as water softeners, air cleaners, and humidifiers. About one-third of the HVAC Department’s work consists of installations. The vast majority of this work is for private residences, although the HVAC Department occasionally performs some light commercial work.<sup>6</sup> Residential installations tend to be “retrofits” to existing homes, as opposed to the installation of systems in homes during initial construction. On at least two occasions in

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<sup>6</sup> The Employer has performed non-residential work at schools, churches, apartment buildings, and strip malls. Department Manager Mark Feeney estimated that this work constitutes only one percent of the HVAC Department’s total volume of installation work,

the past few years, the HVAC Technicians have installed HVAC equipment in new homes owned by the Employer's managers.

The HVAC Technicians' duties vary. One Technician estimated that 99 percent of his work consists of installations, while another Technician testified that he performs service and cleaning work about 90 percent of the time and installation work the remainder of the time. Since the advent of the NHI Department, the HVAC Department has begun servicing some of the systems installed by the new department.

Service Manager Mark Feeney is the immediate supervisor of the HVAC Department Technicians. Feeney manages the HVAC Department on a day-to-day basis, and he is responsible for evaluating and disciplining the Technicians. Feeney reports to Rocco Lacertosa, the General Manager of the Fuel Oil and HVAC Division, who in turn reports to Jeffrey Nielsen, the Employer's Chairman of the Board. Ron Fromal handles customer credit and collections for the HVAC Department, while Ed Zerbe is responsible for billing and parts inventories. The HVAC Department also has a Dispatcher.

The HVAC Technicians possess various certifications, among them a heat installer's license and a refrigerant certification, and they receive annual training to maintain their certificates and licenses. A typical workday begins at 7:00 a.m. and ends at around 4:30 or 5:00 p.m. Feeney distributes assignments to the Technicians as they arrive, and as each Technician completes his first assignment, he calls Feeney or the Dispatcher to receive his next assignment, a process that repeats itself throughout the workday. The Technicians are required to work overtime and on weekends as assigned, and to be on call about once every nine days. They wear uniforms with the Employer's logo, and the Employer provides them with vans that also bear this logo. Depending on the type of customer, pricing in the HVAC Department may be based either on flat rates for work performed or pursuant to service contracts.

HVAC Technician Randall Reichart testified that he has seen employees from NHI on about six to ten occasions, but they never worked together on the same projects. He occasionally saw them at their jobs,<sup>7</sup> at the supply house, or when they came to the Spring Street facility to pick up equipment. Technician Dale Berger testified that he has seen the NHI Installers frequently at the supply house and once at the Spring Street facility, where they came to pick up air conditioner materials.

#### *New Home Installation Department*

According to Chairman of the Board Nielsen, the Employer started the NHI Department in order to develop a new source of HVAC installation work, from housing developers and contractors. Nielsen testified that the Employer decided to start performing new construction installation work when Ron Trupp, who had substantial experience in this type of operation, decided to leave his previous employer and come to work for the Employer. The Employer had not previously engaged in very much

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<sup>7</sup> On one of these occasions, he was driving by a job site, saw a Berks truck, and went in to greet the Installer, with whom he was previously acquainted.

of this work, and the Employer expects it to be profitable in its own right, as well as a source of business for the HVAC Department.<sup>8</sup>

The NHI Department is overseen by Trupp, who reports to Rocco Lacertosa. Like Feeney in the HVAC Department, Trupp is responsible for evaluating and disciplining the employees in the NHI Department. Other than Trupp, there are five individuals in the department: Supervisor Steve Carr, three Installers, and an Electrician.<sup>9</sup> Roger Cote and Laurie English, from the Employer's corporate credit department, handle credit for the department. Trupp and the Electrician are responsible for sales, and Trupp and Carr purchase all materials.

From July through October 2003, the NHI Department performed approximately 15 installation jobs. Only about two or three of these jobs were installations of systems in new homes; the remaining jobs were retrofits to existing structures. Unlike the residential work for the HVAC Department, the NHI installation projects were largely for developer and contractor clients. Nielsen attributed the fact that the NHI Department has primarily performed work other than new home installations to the NHI Department's incipience, emphasizing that the NHI Department is working toward breaking into that segment of the business. In fact, the Employer recently received a contract with a large home builder for future work.

The Installers report to work at the Pottsville Pike facility, where they receive their assignments from Trupp and Carr, both of whom work out of the same facility. In new home installation work, the pricing is generally set either through a competitive bidding process or through negotiations with the developer or contractor. Because the work does not entail emergency service, the Installers are not required to work overtime and weekends, nor are they on call. NHI employees do not perform service or maintenance work. For the most part, the NHI Installers and the HVAC Technicians possess similar skills, although unlike the HVAC Technicians, NHI Installers require licenses to turn on new gas service. Like the HVAC Technicians, the NHI Technicians wear company uniforms and drive company vehicles. They do not share tools or vehicles with the HVAC Department. To date, no employees have transferred from NHI to HVAC or HVAC to NHI.

#### **IV. ANALYSIS**

I find that the Installers in the NHI Department are not an accretion to the existing unit. HVAC and NHI operate at separate locations as two distinct departments, with separate day-to-day supervision, separate vehicles and tools, and separate employee work schedules. Significantly, there has been no transfer or interchange between the two departments, and the employees of the respective departments never work together and do not regularly encounter one another. The two departments

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<sup>8</sup> Nielsen testified that the NHI Department, like the HVAC Department, will generate its own profit-and-loss statement. The HVAC Department installation work has traditionally been unprofitable but has led to overall corporate profits because it results in increased oil sales.

<sup>9</sup> No party seeks to include the Electrician in the bargaining unit.

also have separate arrangements for purchasing, sales, and credit processing. Although employees in both departments perform similar work and have similar training, these factors are outweighed by the factors that militate against finding an accretion. In this regard, while NHI Installers share some community of interest with HVAC Technicians, it is not so overwhelming as to rebut the presumption that the new facility is a separate appropriate unit. *Passavant Retirement and Health Center*, supra. I therefore find that the Petitioner's contention that the NHI Installers should be accreted to the existing unit is without merit. *Archer Daniels Midland Co.*, supra; *Passavant Retirement and Health Center*, supra.

The Petitioner further contends that this case should be analyzed in accordance with the Board's decision in *The Sun*, 329 NLRB 854 (1999). In that case, the Board added, through a unit clarification proceeding, a newspaper's creative services department employees to a unit of employees performing composing room work because the creative services employees performed work covered by the functionally described unit description.<sup>10</sup> The Board emphasized in that case that the distinction between functionally described units and units that are defined by job classifications was critical to its analysis. In this case, the unit description includes "heating and air conditioning service mechanics and helpers, and oil drivers." Thus, contrary to the Petitioner's contention, the unit is defined not by the work performed, but rather by job classifications. Because the unit is not functionally described, the analysis used by the Board in *The Sun* is inapplicable. See *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166, 1168 fn. 9 (2001); *Archer Daniels Midland Co.*, supra, fn. 1.

Additionally, although there is some overlap between the installation duties of the HVAC Technicians and the NHI Installers, the two groups do not generally perform the same functions. Thus, the HVAC Technicians as a group primarily perform service and maintenance work; only about one-third of their work consists of installation, and this work is almost entirely residential retrofitting work. The Employer established the NHI Department to perform different functions, i.e., installation work for developers and contractors on new construction projects. To date, the NHI Installers have primarily performed installations for commercial developers rather than for private homeowners, and it is anticipated that they will focus on installation of equipment in new homes in the future. Accordingly, the NHI Installers are not covered under the current collective-bargaining agreement. Cf. *Developmental Disabilities Institute, Inc.*, supra; *Premcor, Inc.*, 333 NLRB 1365 (2001).

Accordingly, the Petitioner's request for unit clarification is denied, and the petition is dismissed.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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<sup>10</sup> The contract contained the following recognition clause: "Jurisdiction of the Union begins with the markup of copy and continues until the material is ready for the printing press (but excluding proofreading), and the appropriate collective-bargaining unit consists of all employees performing any such work."

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of the Act.

4. The unit should not be clarified as requested by the petition.

## **VI. ORDER**

**IT IS HEREBY ORDERED** that the petition filed in this case be, and it hereby is, dismissed.

## **VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **February 12, 2004**.

Signed: January 29, 2004

at Philadelphia, PA

/s/

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DOROTHY L. MOORE-DUNCAN  
Regional Director, Region Four

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